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NAVAL FACILITIES ENGINEERING COMMAND
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IN REPLY REFER TO
ACQ 021
26 Sep 01

MEMORANDUM FOR NAVFAC ACQUISITION PERSONNEL

Subj: GUIDANCE REGARDING CONSTRUCTION CONTRACTS AFFECTED BY BASE ACCESS (01-22)

Ref: (a) FAR 52.249-10, Default (Fixed-Price Construction) (APR 1984)
(b) FAR 52.242-14, Suspension of Work (APR 1984)

1. As a result of the recent terrorist acts as well as any potential future impacts resulting from these acts, there have been numerous questions raised regarding what action should or should not be taken on construction contracts affected by base accessibility. This memorandum provides guidance regarding construction contracts.
2. Each contract and situation is unique and, therefore, must be addressed on an individual basis. There could be myriad factual reasons surrounding the causal chain in each situation. Contracting Officers should carefully review and ascertain the unique, individual facts and circumstances surrounding each contract and situation and then exercise sound business judgment in determining how to proceed or handle the situation. The Government acts in both a sovereign and contractual capacity. As explained below, it is important to note that a Contracting Officer who takes direct action under the contract related to delays/disruptions/work stoppages occasioned by increased base security measures could cause the Government to become liable for delay/disruption/suspension costs by his/her direct actions in his/her contractual capacity.
3. References (a) and (b) are contract clauses that may be applicable and are included in our construction contracts for use as prescribed in the respective clauses. Reference (a) lists non-exclusive examples of unforeseeable causes beyond the control and without the fault or negligence of the Contractor that could warrant an *extension in time* for completing the work. These examples include acts by the Government in either its *sovereign* or *contractual capacity*. Under reference (a), base closure, either as an act of the Government in either its sovereign or contractual capacity, could potentially be a basis for an extension for completing the work. However, it would require reviewing the circumstances to ensure that the action was unforeseeable, did not involve any fault or negligence of the Contractor, and that the facts of the individual circumstance warrant an extension. Reference (b) allows an adjustment for any increase in the *cost of performance* (essentially money damages) of the contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption in performance of the work *due to an action (or inaction) of the Contracting Officer*, i.e., an action by the Government in its *contractual (but not its sovereign) capacity*. Under reference (b), an example would be a Contracting Officer acting in his/her contractual capacity by issuing a suspension of work notice under a contract.

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4. The fact that a base commander has closed or restricted access to the base or portions thereof does not, in and of itself, necessarily require the Contracting Officer to issue any direction to a Contractor concerning the suspension or interruption of work. Generally speaking, therefore, Contracting Officers should seek to avoid taking any actions related to base or work site access that specifically invoke reference (b) or that would allow reference (b) to be invoked by implication. In contrast, under reference (a), base closure or restricted base access, as an act of the Government in either its sovereign or contractual capacity, could potentially be a basis for an extension for completing the work. However, before granting an extension, the Contracting Officer should review the individual circumstances to ensure that the delay was unforeseeable and did not involve any fault or negligence by the Contractor. For instance, was the Contractor scheduled to work or was he physically present on the job site that day? If not, he/she may not be due a time extension.
5. In any event, it is the Contractor's responsibility to initiate any request for entitlement in writing pursuant to the applicable contract clause(s) and to provide adequate documentation to support that request. The Contracting Officer must ascertain the facts and make a sound business judgment on whether there is an entitlement in terms of time and/or money.
6. You are reminded to ensure that adequate documentation is kept on the status of the job site, to include its accessibility and the Contractor's presence/non-presence. It is also prudent to keep a record of the source of any direction or instruction received from the base commander or higher authority that could affect accessibility as well as instructions or information given to Contractor(s).



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